UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL BOSWELL, an incapacitated person by his guardian ad litem, Ethel Boswell, and ETHEL BOSWELL, Individually, Plaintiffs STEVE EOON, KIRSTEN BYRNES, CHRISTINA EICKMAN, PTL. JAMES FEASTER, NEW BRUNSWICK POLICE DEPARTMENT, CITY OF NEW BRUNSWICK, and JOHN DOES (1 through 5) Defendants	08 CV 05098(GEB)(LHG)

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO
FOR SUMMARY JUDGMENT FILED BY DEFENDANTS
CITY OF NEW BRUNSWICK, NEW BRUNSWICK POLICE DEPARTMENT
AND PTL. JAMES FEASTER

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS i

RULE 56.1 RESPONDING STATEMENT OF MATERIAL FACTS 1

LEGAL ARGUMENT:

I. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE ARE DISPUTED MATERIAL FACTS 25

II. DEFENDANTS CITY OF NEW BRUNSWICK AND THE NEW BRUNSWICK POLICE DEPARTMENT ARE NOT ENTITLED TO SUMMARY JUDGMENT 27

A. THE CITY AND THE POLICE DEPARTMENT ARE A SINGLE ENTITY 27

B. PLAINTIFFS CAN ESTABLISH A MONELL CLAIM 27

III. OFFICE FEASTER IS NOT ENTITLED TO SUMMARY JUDGMENT 37

A. OFFICER FEASTER CREATED THE DANGER TO PLAINTIFF 37

B. OFFICER FEASTER IS NOT ENTITLED TO QUALIFIED IMMUNITY 49

IV. OFFICER FEASTER IS NOT ENTITLED TO IMMUNITY UNDER THE NEW JERSEY TORT CLAIMS ACT 53

V. SUMMARY JUDGMENT IS NOT APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE 61

CONCLUSION 64

TABLE OF CITATIONS

Page

290 Madison Corp. v. Capone, 485 F.Supp. 1348 (D.N.J. 1980) 50

A.M. v. Luzerne County Juvenile Detention Center, 372 F.3d 572 (3d Cir. 2004) 34

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996) 62

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 63

Anela v. City of Wildwood, 595 F.Supp. 511 (D.N.J. 1984) 53

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 27

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 25

Bank of Illinois v. Over, 65 F.3d 76 (7^{th} Cir. 1995) 38

Baxter v. AT&T Communications, 712 F.Supp. 1166 (D.N.J. 1989) 62

Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001) 50

Bernstein v. State, 411 N.J.Super. 316 (App.Div. 2010) 60

Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358 (3d Cir. 1992) 25, 44

Bilbili v. Klein, 249 Fed.Appx 284 (3d Cir. 2007) 48

Blunt v. Klapproth, 309 N.J.Super. 493 (App.Div. 1998) 57

Bowers v. DeVito, 686 F.2d 616 (7^{th} Cir. 1982) 37

Bright v. Westmoreland County,
443 F.3d 276 (3d Cir. 2006) 39, 42

Brill v. Guardian Life Insurance Co. of America,
142 N.J. 520 (1995) 53

Canico v. Hurtado,
144 N.J. 361 (1996) 55

Canton v. Harris,
489 U.S. 378 (1989) 30

Cassie v. Cape May,
610 F.Supp.2d 110 (D.N.J. 2009) 46

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 25

Cinelli v. U.S. Energy Partners,
77 F.Supp. 566 (D.N.J. 1999) 62

Colburn v. Upper Darby Township,
838 F.2d 663 (3d Cir. 1988) 27

County of Sacramento v. Lewis,
523 U.S. 833 (1988) 44

Del Tufo v. Township of Old Bridge,
278 N.J.Super. 312 (App.Div. 1995) 54

DeShaney v. Winnebago County Dept. of Social Services,
489 U.S. 189 (1989) 38

Dunlea v. Township of Belleville,
349 N.J.Super. 506 (App.Div. 2002) 55

Estate of Smith v. Marasco,
318 F.3d 497 (3d Cir. 2003) 40, 46, 47

Estate of Smith v. Marasco,
430 F.3d 140 (3d Cir. 2005) 46

Evans v. Elizabeth Police Department,
236 N.J.Super. 115 (App.Div. 1983) 55

Fagan v. City of Vineland,
22 F.3d 1283 (3d Cir. 1994) 29

Fielder v. Stonack,
141 N.J. 101 (1995) 60

Foulk v. Donjon Marine Co., Inc.,
144 F.3d 252 (3d Cir. 1998) 62

Goodman v. Mead Johnson & Co.,
534 F.2d 566 (3d Cir. 1976) 53, 62

Gouled v. United States,
255 U.S. 298 (1921) 28

Hampton v. Borough of Tinton Falls
Police Department,
98 F.3d 107 (3d Cir. 1996) 62

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 50, 51

Harris v. United States,
331 U.S. 145 (1947) 28

Hope v. Pelzer,
536 U.S. 730, 746 (2002) 51

In re City of Philadelphia Litigation,
49 F.3d 945 (3d Cir. 1995) 51

Itzkoff v. F & G Realty of New Jersey,
890 F.Supp. 351 (D.N.J. 1995) 61

Kneipp v. Tedder,
95 F.3d 1199 (3d Cir. 1996) 41, 51

Kollar v. Lozier,
286 N.J.Super. 462 (App.Div. 1996) 60

Krieger v. Ownership Corp.,
270 F.2d 265 (3d Cir. 1959) 61

Lang v. New York Life Insurance Co.,
721 F.2d 118 (3d Cir. 1983) 60

Mark v. Borough of Hatboro,
51 F.2d 1127 (3d Cir. 1995) 42

Marzano v. Computer Science Corp., Inc.,
91 F.3d 497 (3d Cir. 1996) 61

Michaels v. New Jersey,
222 F.3d 118 (3d Cir. 2000) 61

Miller v. City of Philadelphia,
174 F.3d 368 (3d Cir. 1999) 46

Monell v. Department of Social Services,
436 U.S. 658 (1978) 29, 37

Morey v. Palmer,
232 N.J.Super. 144 (App.Div. 1989) 56

Morse v. Lower Merion School District,
132 F.3d 902 (3d Cir. 1997) 49

Owen v. City of Independence,
445 U.S. 622 (1980) 29

Paton v. La Prade,
524 F.2d 862 (3d Cir. 1975) 61

Perona v. Township of Mullica,
270 N.J.Super. 19 (App.Div. 1994) 57

Popow v. City of Margate,
476 F.Supp. 1237 (D.N.J. 1979) 32

Reed v. Gardner,
986 F.2d 1122 (7th Cir. 1993) 39

Reitz v. County of Bucks,
125 F.3d 139 (3d Cir. 1997) 30

Rivas v. City of Passaic,
365 F.3d 181 (3d Cir. 2004) 40

Rossi v. Standard Roofing, Inc.,
156 F.3d 452 (3d Cir. 1998) 62

Saucier v. Katz,
533 U.S. 104 (2001) 50, 51

Simmons v. City of Philadelphia,
947 F.2d 1042(3d Cir. 1991) 29, 30

Stemler v. City of Florence,
126 F.3d 856 (6th Cir. 1997) 39

Stoeckel v. Township of Knowlton,
387 N.J.Super. 1 (App.Div. 2006) 55

Suarez v. Dosky,
171 N.J.Super. 1 (App.Div. 1979) 58

T & M Homes, Inc. v. Township of Mansfield,
162 N.J.Super. 497 (Law Div. 1978) 53

Tice v. Cramer,
133 N.J. 347 (1993) 53

White v. Rochford,
591 F.2d 381 (7th Cir. 1979) 28, 37

Wolf v. Colorado,
338 U.S. 25 (1949) 28

Wood v. Ostrander,
879 F.2d 583 (9th Cir. 1989) 39

Ye v. United States,
484 F.3d 634 (3d Cir. 2007) 47

FEDERAL STATUTES

42 U.S.C. § 1983 . . . . 25, *passim*

FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.Pr. 56 61

Fed.R.Civ.Pr. 56(c) 25

NEW JERSEY STATUTES

N.J.S.A. 52:17b-66 1

N.J.S.A. 59:3-1 53

N.J.S.A. 59:3-2(b) 57

N.J.S.A. 59:3-3 . . . . 53, 54, 55

N.J.S.A. 59:3-14 60

N.J.S.A. 59:5-4 58

OTHER AUTHORITIES

Margolis and Novak,
Claims Against Public Entities, p. 81 (2010 ed.) 58

RULE 56.1 RESPONDING STATEMENT OF MATERIAL FACTS

1. Plaintiffs admit that the New Brunswick Police Department is an agency within the City of New Brunswick and is a duly-formed entity of the State of New Jersey.

2. Plaintiffs admit that the New Brunswick Police Department operates pursuant to applicable state and federal laws, and with the rules, regulations, orders, directives, policies and procedures consistent with the Attorney General's Guidelines. *[See Defendant's Exhibit K: Mangarella Deposition, p. 17 line 9 to p. 18 line 10 and p. 26 line 19 to p. 27 line 5]*

3. Plaintiffs admit that all individuals appointed as municipal police officers must successfully complete a training course approved by the New Jersey Police Training Commission and be certified as a police office by the Police Training Commission, pursuant to N.J.S.A. 52:17B-66 *et seq.*

4. Plaintiffs admit that after police academy training, officers in the New Brunswick Police Department receive biannual use of force training, domestic violence training, blood borne pathogen training and firearms training, as required by the Attorney General's Office but administered by instructors within the New Brunswick Police Department. *[See Defendant's Exhibit K: Mangarella Deposition, p. 11 line 8 to p. 12 line 16]*

4a. Plaintiffs **add** that there are no guidelines issued by the Attorney General's Office as to how to recognize an intoxicated person or how to deal with an intoxicated person. *[See Defendant's Exhibit K: Mangarella Deposition, p. 25 lines 8 to 15]*

4b. Plaintiffs **add** that there is no biannual training in the New Brunswick Police Department on how to identify persons suspected of substance abuse, including alcohol. The only training for this is through the police academy training. *[See Defendant's Exhibit K: Mangarella Deposition, p. 30 lines 3 to 24]*

4c. Plaintiffs **add** that the New Brunswick Police Department has not generated any general orders or Standard Operating Procedures (SOPs) dealing with how to handle people who are intoxicated in public or how to handle homeless people. *[See Defendant's Exhibit K: Mangarella Deposition, p. 18 lines 1 to 25]*

4d. Plaintiffs **add** that Peter Mangarella, the Deputy Police Director of the New Brunswick Police Department, is not familiar with any national standards dealing with how to handle intoxicated persons by police officers in public. *[See Defendant's Exhibit K: Mangarella Deposition, p. 21 lines 14 to 17]*

4e. Plaintiffs **add** that there is no policy or procedure in the New Brunswick Police Department dealing with what a police officer is to do when he suspects a person is intoxicated in public. The only training for this situation comes from basic police academy instruction. *[See Plaintiff's Exhibit A: Mangarella Deposition, p. 21 line 23 to p. 22 line 17]*

4f. Plaintiffs **add** that there is no policy in the New

Brunswick Police Department that would mandate that a police officer take into custody a person intoxicated in public, but that officers can bring persons who are highly intoxicated to a medical facility or have technicians brought to the scene to evaluate the person. The police officer has discretion under this policy to take the individual either to the hospital or to the police department. *[See Defendant's Exhibit K: Mangarella Deposition, p. 27 line 6 to p. 29 line 1]*

4g. Plaintiffs **add** that there is no policy in the New Brunswick Police Department dealing with the issue of what to do with a homeless person, but officers can deal with the homeless by getting them to a shelter. There are no city shelters but there is a private shelter. *[See Defendant's Exhibit K: Mangarella Deposition, p. 29 lines 2 to 19]*

4h. Plaintiffs **add** that Deputy Police Director Mangarella, the highest police officer in the New Brunswick Police Department, stated that it there is an individual who is highly intoxicated in a public place, the officers are going to act on that and have the individual brought to a medical facility or have technicians brought to the scene to evaluate the individual. He indicated that this is to protect not only the public, but also the intoxicated person. *[See Defendant's Exhibit K: Mangarella Deposition, p. 28 lines 1 to 10]*

5. Plaintiffs admit that James Feaster has been a police

officer with the New Brunswick Police Department for 26 years. *[See Defendant's Exhibit L: Feaster Deposition, p. 8 lines 9 to 14]*

5a. Plaintiffs **add** that Officer Feaster is a patrol officer in uniform and has never been promoted. *[See Defendant's Exhibit L: Feaster Deposition, p. 9 lines 1 to 9]*

6. Plaintiffs admit that Officer Feaster attended the Middlesex County Police Academy 26 years ago. *[See Defendant's Exhibit L: Feaster Deposition, p. 11 lines 1 to 5]*

7. Plaintiffs admit that after completing the academy training 26 years ago, Officer Feaster completed six-weeks of in-service training with the New Brunswick Police Department. *[See Defendant's Exhibit L: Feaster Deposition, p. 11 lines 10 to 20]*

8. Plaintiffs admit that Officer Feaster received later training in accident investigation, drug recognition, and training for training officers at the range. The drug recognition training took place at the Police Academy in Sea Girt early in his police career. He has had no refresher courses in drug recognition. The drug recognition course did not include alcohol recognition. His only training with alcohol recognition was basic police academy and training with his training officer. *[See Defendant's Exhibit L: Feaster Deposition, p. 11 line 11 to p. 14 line 19]*

9. Plaintiffs admit that in his initial and subsequent training as to how to interact with people he suspects are intoxicated, Officer Feaster was trained to make an evaluation by

looking at their movements, their physical appearance, their breath and other visible signs. *[See Defendant's Exhibit L: Feaster Deposition, p. 84 line 13 to p. 85 line 1]*

10. Plaintiffs admit that Officer Feaster's duties as a patrol officer include issuing summonses for violations of the law, enforcing motor vehicle laws, investigating motor vehicle accidents, investigating criminal activities, settling disputes, enforcing the law and ordinances, and directing traffic. *[See Defendant's Exhibit L: Feaster Deposition, p. 14 line 23 to p. 15 line 3; p. 18 lines 10 to 18]*

11. Plaintiffs admit that at all times relevant, Officer Feaster was acting in his official capacity as a police officer with the New Brunswick Police Department.

12. Plaintiffs admit that on September 4, 2005, Officer Feaster was working the night shift from 8:30 p.m. to 6:45 a.m. *[See Defendant's Exhibit L: Feaster Deposition, p. 16 lines 17 to 22]*

13. Plaintiffs admit that Officer Feaster was assigned to a patrol car and was working alone. *[See Defendant's Exhibit L: Feaster Deposition, p. 19 lines 5 to 19]*

14. Plaintiffs admit that Officer Feaster, driving a marked patrol car, entered Boyd Park by the Rutgers University boathouse and drove along the paved road that runs parallel to the canal. *[See Defendant's Exhibit L: Feaster Deposition, p. 27 line 1 to p.*

28 line 5]

15. Plaintiffs admit that the boundaries of Boyd Park are Route 18 to the west, the New Street overpass to the north, the canal and Raritan River to the east, and the boathouse to the south. *[See Defendant's Exhibit L: Feaster Deposition, p. 23 line 11 to p. 26 line 7]*

15a. Plaintiffs **add** that there are only two ways to get out of Boyd Park – swim the canal and river to Highland Park or cross Route 18, a heavily-traveled six-lane highway.

16. Plaintiffs admit that Officer Feaster saw something by the picnic tables about 30 yards away, and that when he activated his spotlight, he saw a figure or person sit up. *[See Defendant's Exhibit L: Feaster Deposition, p. 28 lines 6 to 24]*

17. Plaintiffs admit that Officer Feaster drove toward the picnic area with his headlights on the person, and notified police headquarters that he was stopping a person in Boyd Park. *[See Defendant's Exhibit L: Feaster Deposition, p. 28 line 25 to p. 31 line 11]*

18. Plaintiffs admit that Officer Feaster exited his vehicle and started walking toward the person, who was about ten feet away at this point. *[See Defendant's Exhibit L: Feaster Deposition, p. 31 lines 12 to 18]*

19. Plaintiffs admit that Officer Feaster walked up to the individual and stood five feet away on the other side of the park

bench. *[See Defendant's Exhibit L: Feaster Deposition, p. 32 lines 2 to 13]*

20. Plaintiffs admit that Officer Feaster could see the individual clearly as the headlights on the patrol car were directed at the individual, who remained seated with his hands on the table as Officer Feaster approached and did not make any statements at that time. *[See Defendant's Exhibit L: Feaster Deposition, p. 33 line 9 to plaintiff 35 line 5]*

21. Plaintiffs admit that Officer Feaster asked the individual for identification. *[See Defendant's Exhibit L: Feaster Deposition, p. 33 lines 9 to 13]*

22. Plaintiffs admit that the individual put his hand into his pocket and handed Officer Feaster an identification card, but did not say anything. *[See Defendant's Exhibit L: Feaster Deposition, p. 35 line 6 to p. 36 line 16]*

23. Plaintiffs admit that the identification card was not a driver's license or credit card, but provided the name and address and date of birth of the individual. *[See Defendant's Exhibit L: Feaster Deposition, p. 35 line 19 to p. 36 line 14]*

23a. Plaintiffs **add** that the card identified the individual as Michael Boswell, gave an address of 5 Elm Row, New Brunswick, and gave Mr. Boswell's social security number. Officer Feaster knew that Elm Row is by the courthouse, but claimed not to know if it is a place there where someone can live or whether it is all commercial. *[See Defendant's Exhibit L: Feaster Deposition, p. 36 line 15 to p. 37 line 24; p. 42 line 21 to p. 43 line 12]*

23b. Plaintiffs **add** that Elm Row is two blocks from New Brunswick police headquarters. The Middlesex County Courthouse is across the street from 5 Elm Row. Elm Row is in a commercial district and 5 Elm Row has long been an office building and has no residences. The signs in the windows of the building show that it is an office building, and there is a sign next to the door that says "Offices For Rent". *[See Plaintiff's Exhibit B: Photographs]*

24. Plaintiffs admit that Mr. Boswell remained seated on the picnic bench and did not say anything. *[See Defendant's Exhibit L: Feaster Deposition, p. 38 lines 1 to 5]*

25. Plaintiffs admit that Officer Feaster called police headquarters to run a warrants check, which came back negative. *[See Defendant's Exhibit L: Feaster Deposition, p. 38 lines 6 to 15]*

26. Plaintiffs admit that Officer Feaster issued Mr. Boswell a summons for being in the park after hours, in violation of City Ordinance 12:28:010, which restricts the use of the park from a half hour after sunset to sunrise. *[See Defendant's Exhibit L: Feaster Deposition, p. 38 lines 16 to 23]*

27. Plaintiffs admit that Officer Feaster handed the summons to Mr. Boswell, who was still sitting, and told him that he had to leave the park. Officer Feaster, who was within five feet of Mr.

Boswell, claims that he did not appear to be intoxicated or incoherent and did not slur his words. *[See Defendant's Exhibit L: Feaster Deposition, p. 43 line 25 to p. 45 line 4]*

28. Plaintiffs admit that Officer Feaster told Mr. Boswell that he was not supposed to be in the park at night and that he was going to have to leave. *[See Defendant's Exhibit L: Feaster Deposition, p. 44 lines 6 to 9]*

29. Plaintiffs admit that Mr. Boswell got up, moved away from the picnic table and started to go toward the canal, which is next to the Raritan River. *[See Defendant's Exhibit L: Feaster Deposition, p. 45 lines 6 to 8]*

30. Plaintiffs admit that Officer Feaster observed Mr. Boswell as he walked away. *[See Defendant's Exhibit L: Feaster Deposition, p. 45 lines 9 to 10]*

31. Plaintiffs admit that Mr. Boswell began walking in the direction of the canal, which was about a hundred yards away. *[See Defendant's Exhibit L: Feaster Deposition, p. 49 lines 6 to 21]*

32. Plaintiffs admit that Officer Feaster stated that he again told Mr. Boswell that he had to leave the park, and he directed Mr. Boswell in the direction of Route 18 and its intersection with Commercial Avenue. *[See Defendant's Exhibit L: Feaster Deposition, p. 50 lines 4 to 12]*

32a. Plaintiffs **add** that Officer Feaster anticipated that Mr. Boswell would follow his instruction and leave the park by crossing

Route 18. Officer Feaster did not see Mr. Boswell cross Route 18 and did not see the accident. *[See Defendant's Exhibit L: Feaster Deposition, p. 76 line 20 to p. 77 line 5]*

33. Plaintiffs admit that Mr. Boswell walked around the concession stand and walked towards Commercial Avenue and Route 18. *[See Defendant's Exhibit L: Feaster Deposition, p. 51 line 4 to p. 52 line 5]*

34. Plaintiffs admit that Officer Feaster stated that he then saw an empty quart bottle of alcohol under the bench where Mr. Boswell had been sitting. *[See Defendant's Exhibit L: Feaster Deposition, p. 45 line 20 to p. 46 line 11]*

35. Plaintiffs admit that Officer Feaster stated that he never observed Mr. Boswell drinking from that bottle, but believed that he had been drinking from it. *[See Defendant's Exhibit L: Feaster Deposition, p. 47 lines 10 to 16]*

36. Plaintiffs admit that Officer Feaster picked the bottle up, emptied it and threw it in the trash. *[See Defendant's Exhibit L: Feaster Deposition, p. 47 lines 1 to 5]*

37. Plaintiffs admit that Officer Feaster stated that he saw Mr. Boswell rip up the ticket he had been given. *[See Defendant's Exhibit L: Feaster Deposition, p. 51 lines 12 to 18]*

38. Plaintiffs admit that Mr. Boswell was saying something, but Officer Feaster could not make out what he was saying, in part because he could not understand what Mr. Boswell was saying. *[See*

Defendant's Exhibit L: Feaster Deposition, p. 51 line 21 to p. 53 line 3]

39. Plaintiffs admit that Officer Feaster returned to his patrol vehicle and began writing a second ticket for Mr. Boswell for having an open container of beer. *[See Defendant's Exhibit L: Feaster Deposition, p. 52 line 5 to p. 53 line 14]*

40. Plaintiffs admit that Officer Feaster indicated that he intended to serve this second ticket by either sending it to Mr. Boswell by mail or by attaching it to the first summons and serving it on him in court. *[See Defendant's Exhibit L: Feaster Deposition, p. 54 lines 19 to 21]*

40a. Plaintiffs **add** that Officer Feaster wrote this second ticket before the accident. Mr. Boswell was not running from Officer Feaster and Officer Feaster could have called to Mr. Boswell to wait. *[See Defendant's Exhibit L: Feaster Deposition, p. 53 line 15 to p. 56 line 1]*

41. Plaintiffs admit that Officer Feaster stated that he continued to observe Mr. Boswell as he walked out of Boyd Park towards Commercial Avenue. Plaintiffs admit that Officer Feaster claims that he did not observe Mr. Boswell having any difficulty with his walking. *[See Defendant's Exhibit L: Feaster Deposition, p. 66 line 22 to p. 67 line 11]*

42. Plaintiffs admit that Officer Feaster claims that Mr. Boswell appeared to understand him, was cooperative with him and

responded immediately and appropriately to all commands. Plaintiffs admit that Officer Feaster claims that Mr. Boswell's speech was clear and coherent, Mr. Boswell's physical coordination was controlled and balanced, and that he detected no odor of alcohol during his interaction with Mr. Boswell. *[See Defendant's Exhibit L: Feaster Deposition, p. 44 line 19 to p. 45 line 16; p. 48 lines 18 to 22; p. 57 lines 13 to 16; p. 69 lines 14 to 17]*

42a. Plaintiffs **add** that Officer Feaster testified that he was within five feet of Mr. Boswell but also testified that he did not get close enough to smell Mr. Boswell's breath, and he does not recall the appearance of Mr. Boswell's pupils. *[See Defendant's Exhibit L: Feaster Deposition, p. 44 line 17 to p. 45 line 19]*

43. Plaintiffs admit that Officer Feaster claims that based on his training and experience, he made sufficient observations of Mr. Boswell to determine that he was not intoxicated. *[See Defendant's Exhibit L: Feaster Deposition, p. 90 line 23 to p. 91 line 9]*

44. Plaintiffs admit that Officer Feaster claims that based on his training and observations, he did not believe that Mr. Boswell was under the influence of alcohol or a controlled substance. *[See Defendant's Exhibit L: Feaster Deposition, p. 91 lines 4 to 6]*

45. Plaintiffs admit that Officer Feaster testified that he chose not to arrest Mr. Boswell because he had identification, did not appear to be incapacitated by alcohol, and was not a danger to himself of others. *[See Defendant's Exhibit L: Feaster Deposition,*

p. 72 line 15 to p. 73 line 1; plaintiff 85 line 17 to p. 86 line 11] Plaintiffs admit that had Officer Feaster determined that Mr. Boswell was incapacitated by alcohol, he could have taken him to Robert Wood Johnson University Hospital for evaluation. *[See Defendant's Exhibit K: Mangarella Deposition, p. 34 line 14 to p. 35 line 1]* Plaintiffs admit that Officer Feaster claims that he did not think Mr. Boswell was a danger to himself or that he was intoxicated. *[See Defendant's Exhibit L: Feaster Deposition, p. 69 lines 1 to 4; p. 85 line 17 to p. 86 line 11]*

46. Plaintiffs admit that while Officer Feaster was still sitting in his patrol car in the park, he was advised by the dispatcher that there was an accident on Route 18 and Commercial Avenue. *[See Defendant's Exhibit L: Feaster Deposition, p. 77 lines 7 to 11]*

47. Plaintiffs admit that Officer Feaster drove his patrol car to the intersection of Route 18 and Commercial Avenue and that he was the first officer at the scene. Plaintiffs admit that the accident occurred in the southbound lanes of Route 18. *[See Defendant's Exhibit L: Feaster Deposition, p. 77 lines 11 to 17]*

48. Plaintiffs admit that Officer Feaster observed two vehicles in the intersection with people out of the cars in an excited state. He was told that a person was under one of the cars. When Officer Feaster looked under the car, he saw a person who was dressed the same as Mr. Boswell. *[See Defendant's Exhibit*

L: Feaster Deposition, p. 77 lines 18 to 25]

49. Plaintiffs admit that Officer Feaster radioed for an ambulance, a road supervisor, an identification unit and the traffic safety unit. *[See Defendant's Exhibit L: Feaster Deposition, p. 79 lines 5 to 9]*

50. Plaintiffs admit that Officer Barber, the traffic safety officer, arrived and took over the accident investigation. *[See Defendant's Exhibit L: Feaster Deposition, p. 7 to 11]*

50a. Plaintiffs **add** that the accident report prepared by Officer Barber lists Mr. Boswell as being homeless. The report indicates that the traffic light was green for cars on Route 18 and that Mr. Boswell walked onto Route 18 against the light. *[See Plaintiff's Exhibit F]*

51. Plaintiffs admit that Officer Feaster testified that he did not see Mr. Boswell cross the intersection. *[See Defendant's Exhibit L: Feaster Deposition, p. 75 lines 16 to 17]*

52. Plaintiffs admit that Mr. Boswell has no independent recollection of the accident or of the events leading to the accident. *[See Defendant's Exhibit O: Ethel Boswell Deposition, p. 49 line 22 to p. 50 line 18]* Plaintiffs admit that there are no fact witnesses to the interaction between Mr. Boswell and Officer Feaster.

53. Plaintiffs admit that they allege that Officer Feaster, the City of New Brunswick and the New Brunswick Police Department

were negligent, violated Mr. Boswell's civil rights and violated the New Jersey Civil Rights Act. *[See Defendant's Exhibit E: Complaint]*

54. Plaintiffs admit that they have retained James A. Williams, a police liability expert, and that Mr. Williams had opined that Officer Feaster should have removed Mr. Boswell from Boyd Park because Mr. Boswell was highly intoxicated. Plaintiffs admit that Mr. Williams opines that by failing to remove Mr. Boswell from the park, Officer Feaster ignored his training and the requirements of the New Brunswick Police Department and the State of New Jersey. *[See Defendant's Exhibit P]*

54a. Plaintiffs **add** that Mr. Williams opined that police officers are trained to understand the justifications of the New Jersey statutes that apply to the use of force in controlling the actions of the public. He opined that police officers are trained under the guidelines of the New Jersey Police Training Commission, Basic Course for Police Officers, section 6.4.6, to recognize and appropriately interact with persons demonstrating anger, hostility, hysteria, fear, intoxication and deranged conditions. Mr. Williams opined that officers are trained in the procedures that allow them to properly and effectively communicate with and control the various reactions of the public. Mr. Williams opined that police officers are trained under the guidelines, section 3.5.2E, to have an awareness of his/her own emotional reactions to various types of individuals, and that this training highlights handling excited individuals who are emotionally disturbed or otherwise mentally or physically unable to respond to the directions or commands of the officer. *[See Defendant's Exhibit P]*

54b. Plaintiffs **add** that the Deputy Police Director of the New Brunswick Police Department admitted that after basic police academy training, the only training received by New Brunswick police officers is biannual training in use of force, domestic violence, blood borne pathogen and firearms. *[See Defendant's Exhibit K: Mangarella Deposition, p. 30 lines 3 to 24]*

54c. Plaintiffs **add** that Mr. Williams opined that Officer Feaster grossly failed to use due caution and the use of trained and known procedures for the handling of intoxicated persons, and that by failing to even attempt to protect a clearly unstable person from injuring himself, Officer Feaster not only allowed Mr. Boswell to place himself in harm's was, but in fact, ordered him from a place of safety into a heavily traveled highway to be struck down and run over by vehicles. *[See Defendant's Exhibit P]*

54d. Plaintiffs **add** that Mr. Williams' opinions are based on his specialized training and knowledge of police policy, practice and procedure, as well as his continued involvement in police and security training nationally, and his continued academic participation as an adjunct professor for criminal justice studies at Rowan University. His opinions are provided with a reasonable degree of professional certainty within the field of law enforcement. *[See Defendant's Exhibit P]*

54e. Plaintiffs **add** that Mr. Williams issued a supplemental report after receiving additional information and documents, including the deposition of Officer Feaster and the report of Dr. Gary Lage. Mr. Williams noted that Dr. Lage opined that Mr. Boswell's level of intoxication was the major causative factor in Mr. Boswell's inability to protect himself from injury, but that Officer Feaster testified that Mr. Boswell was not intoxicated or incoherent. Mr. Williams stated that these conflicting statements reinforce his stated opinions, and that there is no factual documentation that Officer Feaster made an effort to provide the mandated police policy and procedural requirements to safely remove an intoxicated and homeless Michael Boswell to a shelter for safety and detoxification. He reiterated that it is national police policy, including New Jersey, to safely remove intoxicated and homeless persons from the city streets to a place of security and detoxification. Mr. Williams opined that Officer Feaster blatantly disregarded police policy and procedures of the State of New Jersey and the requirements of the New Brunswick Police Department mandating the handling of intoxicated and/or homeless persons. *[See Plaintiff's Exhibit C]*

55. Plaintiffs admit that the New Brunswick defendants have retained William F. Kraus, a former police chief, and that Mr. Kraus opined that based upon Mr. Boswell's behavior and conduct while in the presence of Officer Feaster, all actions taken by

Officer Feaster were proper and within accepted police practices and procedures. He stated that in the absence of shown intoxication, Officer Feaster could not have detained Mr. Boswell and he was not under a duty to do so. *[See Defendant's Exhibit Q: Kraus Report]*

55a. Plaintiffs **add** that Mr. Kraus stated: "If no evidence of intoxication was shown, under the law, no discretionary authority legally existed for Officer Feaster to detain Mr. Boswell." *[See Defendant's Exhibit Q: Kraus Report]*

55b. Plaintiffs **add** that Mr. Kraus stated in his deposition that if Officer Feaster did not believe Mr. Boswell was intoxicated, he had no duty to assist him, but that if Officer Feaster thought Mr. Boswell was intoxicated, he could have assisted Mr. Boswell home or to a place where he could be safely taken care of. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 14 line 12 to 15 line 10]*

55c. Plaintiffs **add** that based upon the records, Mr. Kraus made no conclusion whether or not Mr. Boswell was intoxicated. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 17 lines 9 to 17]*

55d. Plaintiffs **add** that Mr. Kraus stated that a police officer has a duty to gather all the facts and to make inferences from what he sees. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 20 line 21 to p. 21 line 1]*

55e. Plaintiffs **add** that Mr. Kraus stated that if a person with a .24 showed signs of intoxication and incapacitation, it would be a breach of duty for the police officer to send them across the highway. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 24 lines 5 to 12]*

55f. Plaintiffs **add** that Mr. Kraus stated that if Officer Feaster suspected Mr. Boswell to be intoxicated, he may move him to a safe place. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 28 line 24 to p. 29 line 4]*

55g. Plaintiffs **add** that Mr. Kraus stated that a police officer has a duty to recognize the signs and symptoms of intoxication, which include slurring of speech, the inability to move, misunderstanding of directions, falling down, odor of alcohol, and sleeping. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 30 line 19 to p. 31 line 4]*

55h. Plaintiffs **add** that Mr. Kraus stated that Officer Feaster had a duty to observe what Mr. Boswell was doing and to recognize the signs of intoxication if they were present. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 33 lines 14 to 24]*

56. Plaintiffs admit that several experts have been retained by the parties to opine regarding Mr. Boswell's blood alcohol concentration (BAC) of .244, taken at Robert Wood Johnson University Hospital after the accident. Plaintiffs admit that Dr. Richard Saferstein, plaintiffs' toxicologist, opined that a typical individual with a BAC range of .24 would have displayed

unmistakable signs of alcohol impairment, such as poor coordination and balance, slurred speech and an unsteady gait. *[See Defendant's Exhibit R: Saferstein Report]* Plaintiffs admit that Dr. Thomas Schwartzer and Dr. Robert Pandina, experts for these defendants, indicated that Mr. Boswell had a history of alcohol-related complaints, hospital visits and admissions, and physiological changes which were consistent with chronic alcoholism and an increased tolerance to alcohol. *[See Defendant's Exhibit S: Schwartzer Report; Defendant's Exhibit T: Schwartzer Deposition, p. 22 line 6 to p. 34 line 24; Defendant's Exhibit U: Pandina Report; Defendant's Exhibit V: Pandina Deposition, p. 24 lines 20 to 25]* Plaintiffs admit that these experts stated that a person with a high tolerance for alcohol could speak without slurring, respond reasonably to questions, sit up and remain still, display fine motor skills, and display gross motor control. *[See Defendant's Exhibit N: Lage Deposition, p. 37 line 21 to p. 38 line 17; Defendant's Exhibit U: Pandina Report; Defendant's Exhibit V: Pandina Deposition, p. 38 line 18 to p. 40 line 22; Defendant's Exhibit T: Schwartzer Deposition, p. 26 lines 8 to 15; p. 41 line 3 to p. 43 line 1; p. 40 line 24 to p. 41 line 2]*

56a. Plaintiffs **add** that Dr. Saferstein, the former head of the New Jersey State Crime Lab, stated that in Mr. Boswell's state of intoxication, his condition would have been obvious to individuals who came in contact with him. He stated that a reasonably trained and reasonably perceptive police officer would have ben able to observe Mr. Boswell's visible state of intoxication. He stated that a BAC of 0.24% will adversely affect visual acuity, resulting in a significant loss of depth and distance perceptions. Dr. Saferstein opined, to a reasonable degree of scientific certainty, that Mr. Boswell was in a significantly impaired state as a result of alcohol intoxication when he attempted to cross Route 18 and was struck by the vehicles. Dr. Saferstein opined that in his intoxicated state, Mr. Boswell's poor sense of judgment and poor motor functions significantly reduced his ability to cross the road in a careful and trouble-free manner. He stated that at the level of intoxication of 0.24%, a person will normally experience a significant reduction in muscular coordination and may be expected to exhibit poor balance and poor body concentration. Increased reaction or response times will also be exhibited, as will difficulties with hand-to-eye coordination. Dr. Saferstein stated that these deficiencies will noticeably impact on an individual's ability to respond to a sudden, unexpected occurrence. A deterioration of judgment and self-control is to be expected with the result being a diminution in one's normal sense of caution and self-restraint. Such an individual normally exhibits a false sense of self-confidence in one's behavioral pattern. Dr. Saferstein stated that an individual so influenced becomes a safety risk, taking chances that would normally be by-passed in he were alcohol-free. *[See Defendant's*

Exhibit R: Saferstein Report]

56b. Plaintiffs **add** that Dr. Saferstein opined, to a reasonable degree of scientific certainty, that Mr. Boswell was in a significantly impaired state at the time of his encounter with Officer Feaster, and that this impairment came about as a result of significant alcohol consumption. Dr. Saferstein stated that the visibly impaired condition of Mr. Boswell would have been obvious to a reasonably trained and reasonably perceptive police officer in Mr. Boswell's presence that evening. He stated that proper precautions should have been taken by Officer Feaster to prevent unnecessary risk that would have endangered Mr. Boswell's health and well-being. Dr. Saferstein opined that the failure of Officer Feaster to utilize the appropriate precautions in dealing with a significantly intoxicated individual must be considered a proximate cause leading to Mr. Boswell's serious injuries. *[See Defendant's Exhibit R: Saferstein Report]*

56c. Plaintiffs **add** that Dr. Gary Lage, an internist and an expert for defendants Byrnes and Eickman, testified that Mr. Boswell's BAC at the time of the accident could have been as high as a .25 or as low as a .23. He stated that the typical effects of alcohol intoxication at that level affects the cerebellum, and as the BAC increases, more areas of the brain, including the frontal lobe, the psychomotor and the cerebellum are affected. He stated that at Mr. Boswell's level of intoxication, all of these areas would be affected. The frontal lobe is affected by decreased inhibition, diminished judgment, dulling of attention, sedation, impaired coordination. The psychomotor area of the brain is affected by disorientation, impaired balance and slurred speech. the cerebellum is involved with motor functions. *[See Plaintiff's Exhibit E: Lage Deposition, p. 14 lines 2 to 15; p. 15 line 23 to p. 18 line 22]*

56d. Plaintiffs **add** that Dr. Lage stated that a person untrained in observing alcohol intoxication in a person can recognize that a person withing the range of .2 to .4 would be intoxicated. He stated that the overwhelming majority of people are visibly intoxicated above a .15. He stated that a person trained in alcohol detection would be more observant of the signs and symptoms and effects of alcohol than somebody who is not trained. *[See Plaintiff's Exhibit E: Lage Deposition, p. 20 line 6 to p. 21 line 14]*

56e. Plaintiffs **add** that Dr. Lage stated that at a BAC of .244, Mr. Boswell would have lack of coordination, would not be able to function correctly, would probably not be able to walk correctly, and would exhibit more observable effects such as impaired reaction time, markedly delayed reaction times, impaired vision, including depth perception, night vision and peripheral vision. He stated that these are impaired when you get to a blood alcohol level even approaching this number. *[See Plaintiff's*

Exhibit E: Lage Deposition, p. 21 line 15 to p. 22 line 9]

56f. Plaintiffs **add** that Dr. Lage opined that prior to the accident, he would expect someone who encountered Mr. Boswell, such as Officer Feaster, to have observed the signs of intoxication in him with a BAC of .244. Dr. Lage stated that at Mr. Boswell's level of intoxication, the visible effects of intoxication, he would expect a trained observer such as Officer Feaster to observe them. *[See Plaintiff's Exhibit E: Lage Deposition, p. 23 lines 15 to 25; p. 28 line 15 to p. 29 line 3]*

It is the plaintiffs' position that the New Brunswick defendants have failed to establish that there is no genuine issue of material fact or that they are entitled to summary judgment as a matter of law.

POINT I

THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE ARE DISPUTED MATERIAL FACTS

On a motion for summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.Pr. 56(c). Where disputed issues of material fact exist, the court may not resolve them on a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986). A material fact is one that can affect the outcome under the governing law. Id. The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In determining whether a genuine issue of material fact exists, the court must draw all inferences in the light most favorable to the non-moving party, and where the parties' evidence is contradictory, the non-moving party's evidence must be taken as true. Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

Here, there are several disputed issues of material fact, the primary one being the intoxication of Mr. Boswell. Whether Mr. Boswell was visibly intoxicated is a material fact that will affect the outcome of this case under the law governing plaintiff's 42 U.S.C. § 1983 claims and under the law governing plaintiff's state claims. Officer Feaster claims that he saw nothing to indicate that Mr. Boswell was intoxicated or incapacitated. But Mr. Boswell had a .244% blood alcohol level, and plaintiff's experts opine that he would have shown visible signs and symptoms of intoxication. Even the defendant's expert acknowledged that a tolerant drinker will show some signs of intoxication.

There is a dispute regarding whether Officer Feaster did in fact observe signs and symptoms of intoxication in Mr. Boswell. Officer Feaster testified that he believed that Mr. Boswell had been drinking from the quart bottle. When Officer Feaster told Mr. Boswell he had to leave the park, Mr. Boswell headed for the canal and river. This is not the direction that a non-incapacitated individual would have taken to leave the park. Officer Feaster claimed that Mr. Boswell did not slur his speech, but he also stated that he could not understand what Mr. Boswell was saying.

There is a dispute regarding the homelessness of Mr. Boswell. Officer Feaster claimed that Mr. Boswell was not homeless because he had provided an identification card with an address on it. But the address was 5 Elm Row, which is an office building with no residences in it. Elm Row is two blocks from the New Brunswick Police Department and is opposite the county courthouse. Officer Feaster, as a 26-year veteran of the New Brunswick Police Department, had to know that 5 Elm Row was solely an office building. Under the circumstances, genuine issues of material fact exist that preclude the grant of summary judgment.

POINT II

DEFENDANTS CITY OF NEW BRUNSWICK AND THE NEW BRUNSWICK POLICE DEPARTMENT ARE NOT ENTITLED TO SUMMARY JUDGMENT

A. THE CITY AND THE POLICE DEPARTMENT ARE A SINGLE ENTITY

Plaintiffs agree that the municipality and the police department are treated as a single entity for purposes of § 1983 liability. Colburn v. Upper Darby Township, 838 F.2d 663, 671 n.1 (3d Cir. 1988).

B. PLAINTIFFS CAN ESTABLISH A MONELL CLAIM

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

To prevail in a civil rights action under 42 U.S.C. § 1983, a plaintiff must establish (1) that the defendant had deprived him of a right secured by the United States Constitution and (2) that such deprivation was caused by a person acting under color of law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There is no dispute that the defendants were acting under color of law. Mr. Boswell's primary constitutional claim is that the defendants violated his right to personal security under the Fourteenth Amendment.

The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. The United States Supreme Court has consistently stated that the rights of privacy and personal security protected by the Fourth Amendment are to be regarded as the "very essence of constitutional liberty". Harris v. United States, 331 U.S. 145, 150, 67 S.Ct. 1098, 1101, 91 L.Ed. 1399, 1405 (1947)(quoting Gouled v. United States, 255 U.S. 298, 304, 41 S.Ct. 261, 263, 65 L.Ed. 647, 650 (1921). The right of personal security protected by the Fourth Amendment was made applicable to the states through the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949). Thus, Mr. Boswell has a Fourteenth Amendment liberty interest in his personal security and well-being.

In White v. Rochford, 591 F.2d 381 (7th Cir. 1979), police officers were found to have deprived children of their constitutional rights to personal security where they were abandoned and left alone in a car by the side of a busy highway when their uncle had been arrested for drag racing, with the abandonment resulting in physical and emotional injury to the children. The court stated that although it would be impossible to describe precisely each "liberty" interest protected by the Due Process Claus, it can hardly be doubted that chief among them is the right to some degree of bodily integrity. Id. at 383-384.

Mr. Boswell has constitutional rights to his personal security, bodily integrity and well-being, but Officer Feaster deprived him of those rights by effectively abandoning him when he ordered him out of the park and directed him to Route 18 and Commercial Avenue.

In Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court construed § 1983 as including municipalities as defendants, but municipal liability must be based upon an official policy or custom which causes the injury. The § 1983 claims against the municipality must be considered independently of the § 1983 claims against the individual police officer, since the municipality's liability for a substantive due process violation does not depend upon the liability of any police officer. Fagan v. City of Vineland, 22 F.3d 1283, 1293-94 (3d Cir. 1994), citing Simmons v. City of Philadelphia, 947 F.2d 1042, 1063 (3d Cir. 1991), cert. denied, 503 U.S. 9885, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992). Furthermore, in Owen v. City of Independence, 445 U.S. 622, 633, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the United States Supreme Court held that municipalities are not entitled to qualified immunity based on the good faith of their officials.

The liability claim against the city is that there was no training provided to police officers in identifying intoxicated or homeless persons. In Canton v. Harris, 489 U.S. 378, 388-391, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the Supreme Court held that the inadequacy of police training may serve as the basis for § 1983 liability, where that failure to train employees evidences a deliberate indifference to the rights of the municipality's inhabitants or reflects a deliberate or conscious choice by the municipality. In that event, the failure to provide proper training represents a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. In addition, the deficiency in the city's training program must be closely related to the ultimate injury.

In Reitz v. County of Bucks, 125 F.3d 139, 145 (3d Cir. 1997), it was held that to establish liability on a failure to train claim under § 1983, plaintiffs must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred. In Simmons v. City of Philadelphia, supra, 947 F.2d at 1059, it was held that § 1983 liability may exist if the allegedly unconstitutional action reflects practices of state officials so permanent and well settled as to constitute a custom or usage with the force of law.

Here, the failure to train its police officers in how to deal with persons intoxicated in public or with homeless persons has existed for many years and constitutes a custom or usage with the force of law. New Brunswick police officials knew that their police officers had no training in alcohol recognition beyond the basic police academy course. The Deputy Police Director of the New Brunswick Police Department acknowledged that highly intoxicated persons need to be removed to a medical facility or be evaluated at the scene by EMS technicians, and that this is to protect the person as well as the public. Thus, he was aware of the substantial risk of harm to an individual because of that individual's intoxication.

The need to take action to identify persons at substantial risk of harm because they are intoxicated and are in an area where all modes of egress are dangerous is obvious. But the defendants chose not to provide training geared to identifying intoxicated persons, including tolerant drinkers, who may exhibit fewer or loss obvious signs and symptoms of intoxication but who are still intoxicated and at risk of harm. The absence of such training resulted in the deprivation of Mr. Boswell's constitutional right to personal security and well-being and led directly to the plaintiff's injuries. Officer Feaster directed an intoxicated person to leave the park. There are only two ways to leave the park – by swimming the canal and Raritan River to Highland Park or by crossing the six-lane highway. Both are dangerous. When Mr. Boswell headed for the canal, Officer Feaster re-directed him to Route 18. There is a clear nexus between the failure to train and the plaintiff's injuries.

In Popow v. City of Margate, 476 F.Supp. 1237 (D.N.J. 1979), there was an allegation that there was a complete failure to train police officers, resulting in the shooting death of plaintiff's husband. The police officer was pursuing an individual he believed to be a fleeing kidnapper on a residential street at night. Plaintiff's husband was shot and killed after stepping out of his home in response to the commotion. The court found that the deposition testimony and answers to interrogatories, which must be read in the light most favorable to plaintiff on a motion for summary judgment, create a genuine issue of material fact as to whether the City's police department training procedures were grossly inadequate. The court noted that the police officers received training at the State Police Academy in Sea Girt when they first join the force, but in the case of the officer who shot plaintiff's husband, that was ten years prior to the shooting incident. The only continuing training was shooting instruction at the range every six months, with no instruction on shooting at a moving target, night shooting or shooting in residential areas, which were the conditions surrounding the shooting death.

Here, the evidence establishes that the only training for New Brunswick police officers on how to identify intoxicated persons is at the police academy. The deputy police director admitted that the only training officers receive beyond the police academy is biannual use of force training, domestic violence training, blood borne pathogen training and firearms training. They receive no biannual training on how to identify intoxicated persons or how to identify persons suspected of substance abuse, including alcohol. It can be inferred that there is no training on how to identify the signs and symptoms of a tolerant drinker who, according to these defendants' expert, Dr. Schwartzer, would exhibit some signs and symptoms. There are no general guidelines of SOPs within the New Brunswick Police Department dealing how to handle people intoxicated in public or how to handle homeless people. Thus, the evidence establishes that no training is provided by the New Brunswick Police Department with respect to identifying and dealing with persons intoxicated in public beyond the training at the police academy, which Officer Feaster attended 26 years ago.

The failure to train the New Brunswick police officers effectively gave the officers permission to breach their duty to intoxicated persons. Former police chief Kraus, testifying as an expert in police procedure for these defendants, opined that if no evidence of intoxication was shown, there was no duty to detain Mr. Boswell. Mr. Kraus stated that if Mr. Boswell was intoxicated, Officer Feaster could have assisted him home or to a safe place. It is common knowledge that if a police officer stops a person for driving while under the influence of alcohol, the officer does not allow that person to drive home. Mr. Kraus opined that a police officer has a duty to gather all the facts and to make inferences from what he sees. He stated that if a person with a .24 blood alcohol level showed signs of intoxication, it would be a breach of duty for the police officer to send him across the highway. Mr. Kraus stated that a police officer has a duty to recognize the signs and symptoms of intoxication, and that Officer Feaster had a duty to observe what Mr. Boswell was doing and to recognize the signs of intoxication if they were present. By failing to train its officer to recognize the signs and symptoms of intoxication, even in tolerant drinkers, New Brunswick ensured that its officers would breach that duty.

In A.M. v. Luzerne County Juvenile Detention Center, 372 F.3d 572, 581-583 (3d Cir. 2004), the plaintiff alleged that the staff and administrators at the center violated his substantive due process rights by failing to protect him from harm while he was detained at the center. Plaintiff had been physically assaulted by other juvenile residents on numerous occasions, with the final assault resulting in a puncture wound to his chest. In analyzing the plaintiff's claim of inadequate training of the staff, the court noted that the workers received a three-day orientation when they were hired, which was essentially on-the-job training with respect to the physical plant and fire safety. There was some training on behavioral issues, but specific training was not identified. There was training for the staff on dealing with physical threats to their own safety and on defensive tactics in dealing with conflicts with residents. There was no training for staff or child-care-workers on how to de-escalate conflicts between youths or how to identify children who could be easily victimized.

The court held that the evidence concerning the center's failure to train its child-care workers in areas that would reduce the risk of a resident being deprived of his constitutional right to security and well-being was sufficient to prevent the grant of summary judgment to the center. The court stated that it could not hold that the center was not deliberately indifferent to the risk as a matter of law.

Here, there is no training given to its officers by the New Brunswick Police Department on how to deal with persons intoxicated in public or with homeless persons. There is no training on how to identify a person intoxicated in public so as to protect that person from harm. The New Brunswick police officials were aware of this, having made a deliberate choice not to provide training beyond the police academy. The police officials knew that a substantial risk of harm exists to intoxicated persons if their intoxication is not recognized and they are permitted, even directed, to place themselves in harm's way.

The choice of failing to train its police officers so as to protect all citizens of New Brunswick, including the most vulnerable, amounts to a deliberate or conscious choice by the municipality and its police department, and constitutes deliberate indifference to the rights of the citizens of New Brunswick. Accordingly, New Brunswick's long-standing failure to properly train its police officers in the identification of intoxicated persons, including tolerant drinkers, represents a policy that deprived Mr. Boswell of his constitutional right to personal security, and they can be held liable for the resulting injuries.

POINT III

OFFICER FEASTER IS NOT ENTITLED TO SUMMARY JUDGMENT

A. OFFICER FEASTER CREATED THE DANGER TO PLAINTIFF

Plaintiffs may recover for civil rights violations under 42 U.S.C. § 1983 pursuant to the state-created danger theory, which is used when a state actor, including a police officer, indirectly or directly harms people by creating a danger that ultimately injures them. The foundation for the state-created danger theory originates in the wording of the statute itself, which holds state actors liable if they cause someone "to be subjected" to the deprivation of any constitutional rights, privileges or immunities. In Monell v. Department of Social Services, 436 U.S. 658, 692, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court stated that "Congress did specifically provide that A's tort becomes B's liability if B 'caused' A to subject another to a tort".

The state-created danger theory developed from the "snake pit" cases. In Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982), the court stated: "If the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." One of the first "snake pit" cases was White v. Rochford, 591 F.2d 381 (7th Cir. 1979), where the police arrested an adult driver for racing down the Chicago Skyway. Three minor children were passengers in the car. The adult pleaded with the officers to take the children to the police station or at least to a telephone booth. The officers refused and left the children in the car abandoned on the side of the Skyway. It was night and it was cold, and the children were forced to search for safety. A neighbor eventually rescued the children, but they had suffered significant harm from exposure to the cold. The Seventh Circuit held that liability could be established under the Due Process Clause.

In DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989), the United States Supreme Court moved away from the "snake pit" cases and held that if the state merely fails to protect an individual there is no due process violation. After this ruling, the snake pit theory continued under the more appropriate label of state-created danger, thus keeping the theory within its original purpose. In Bank of Illinois v. Over, 65 F.3d 76, 78 (7th Cir. 1995), noted that all that DeShaney held was that the Constitution does not impose a legally enforceable duty on state officers to protect people from private violence, but if the officers are complicit in the violence, they are liable.

To prevail on a state-created danger claim, a plaintiff must prove four elements: (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006).

In Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997), police officers threatened to arrest a woman if she did not leave the scene in her intoxicated boyfriend's car. The officers physically lifted her from another person's car and placed her in the intoxicated boyfriend's car. It was held that the officers could be held liable for the woman's subsequent death in a motor vehicle accident. In Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), a police officer stranded the female passenger of a drunk driver along the side of the road in a high-crime area at 2:30 a.m. While walking the five miles to her home, she accepted a ride from a stranger, who drove her to a secluded area and raped her. The Ninth Circuit held that plaintiff had raised a triable issue of fact as to whether the police officer had affirmatively placed her in a position of danger. In Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993), police officers arrested the driver of a vehicle, Irby, leaving behind her intoxicated passenger named Rice with the keys to the car. Rice began driving the car, and a few hours later, he collided head on with plaintiff's vehicle, killing plaintiff's wife and pre-natal son and injuring plaintiff, his two daughters and his in-laws. The lower court dismissed plaintiff's state-created danger claim, but the Seventh Circuit reinstated it, stating that it was the police action in removing Irby, combined with their knowledge of Rice's intoxication, which created their liability for the subsequent action. The court of appeals found that the act of placing a drunk driver behind the wheel of the car did not create a danger to the Reed family specifically but rendered the Reeds and the other motorists on the highway vulnerable to a dangerous driver.

In Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003), it was held that summary judgment was precluded because liability for the plaintiff's death from a heart attack induced by stress could be found under a state-created danger theory. The court held that a genuine issue of material fact existed as to whether the fatal heart attack suffered by Smith was a foreseeable consequence of the police conduct. The police had overreacted to a complaint involving the plaintiff, a Vietnam vet who suffered from PTSD and heart disease, by bringing in a special emergency response team that arrived in a helicopter, and by using bright lights, breaking windows and using tear gas. In Rivas v. City of Passaic, 365 F.3d 181 (3d Cir. 2004), EMTs were found to have created the danger by misrepresenting to police officers that the subject undergoing a seizure had assaulted them and by failing to warn police not to restrain him. The court stated that the shocks the conscience standard would be met where the defendants consciously disregarded a substantial risk that the plaintiff would be seriously harmed by their actions.

In Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996), Samantha Kneipp and her husband Joseph were stopped by police while returning home on foot on a cold night in January. They were stopped a short distance from their home for allegedly causing a disturbance by quarreling over Samantha's desire to continue drinking. Samantha was visibly intoxicated and was having difficulty walking, and she smelled of alcohol and urine. She had a projected blood alcohol level of .25%, and according to plaintiffs' expert forensic scientist, Dr. Richard Saferstein, she would have serious incapacitation of muscular coordination, critical judgment, normal perception, and cognitive functions. Joseph asked to go home so he could relieve their babysitter, and the police allowed him to go. He assumed that the police would either take Samantha to a hospital or the police station. Instead, they simply sent her home shortly thereafter. Two hours later, she was found lying at the bottom of an embankment across the street from her home. She sustained permanent brain damage as a result of her exposure to the cold. She suffered hypothermia, which caused anoxia, a decrease in the amount of oxygen delivered to the brain. The brain damage reduced her to an extremely low level of functioning. She is unable to swallow and must be fed by a feeding tube inserted into her stomach; she is virtually blind; she cannot walk or sit upright; her oral communication is dysarthric; she suffers from bowel and bladder incontinence. The Kneipps sued, alleging that the police officers' actions deprived Samantha of her right to substantive due process and her liberty interest in personal security. The district court granted summary judgment to the defendants, but the Third Circuit Court of Appeals reversed, holding that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983.

The court applied the elements of the state-created danger theory set forth in Mark v. Borough of Hatboro, 51 F.2d 1127 (3d Cir.) cert. denied, 516 U.S. 858, 116 S.Ct. 165, 133 L.Ed.2d 107 (1995), which are basically the same as the Bright v. Westmoreland County elements, with the exception of the second element, which under Mark was that the state actor acted in willful disregard for the safety of the plaintiff. The court found that the injuries to Samantha were foreseeable, noting that Dr. Saferstein stated that at a blood alcohol level of .25%, her muscular coordination was seriously impaired. The court stated that a reasonable trier of fact could conclude that at her level of intoxication, she would be more likely to fall and injure herself if left unescorted than someone who was not inebriated. The court held that a reasonable jury could find that the harm likely to befall Samantha if separated from Joseph while in a highly intoxicated state in cold weather was indeed foreseeable.

The court next found that the police officer acted in willful disregard for Samantha's safety. Plaintiffs presented evidence of her level of intoxication. Officer Tedder knew she was drunk. The court then found that there was a relationship between the state and the person injured during which the state placed the victim in danger of a foreseeable injury, because the police officer, exercising his powers as a police officer, placed Samantha in danger of foreseeable injury when he sent her home unescorted in a visibly intoxicated state in cold weather. The court stated that a reasonable jury could find that the police officer exerted sufficient control over Samantha to meet the relationship requirement.

Finally, the court found that the officers used their authority as police officers to create a dangerous situation or to make Samantha more vulnerable to danger had they not intervened. A jury could find that Samantha was in a worse position after the police intervened than she would have been if they had not done so. As a result of the affirmative acts of the police officers, the danger or risk of injury to Samantha was greatly increased.

Applying the elements of the state-created danger theory to the facts of this case, the defendants are not entitled to summary judgment. On a motion for summary judgment, the court must draw all inferences in the light most favorable to the non-moving party, and where the parties' evidence is contradictory, the non-moving party's evidence must be taken as true. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Here, the evidence is contradictory as to whether Mr. Boswell exhibited the signs and symptoms of intoxication. Officer Feaster claims that Mr. Boswell did not appear to be intoxicated or incapacitated. However, he testified that he believed that Mr. Boswell had been drinking, and while he may not have known how much Mr. Boswell had drunk, a reasonable police officer would not direct a person who had been drinking across a busy intersection in the middle of the night. It is undisputed that Mr. Boswell had a blood alcohol content of .244%. Dr. Richard Saferstein, plaintiff's expert, opines that at that level, Mr. Boswell would have exhibited unmistakable signs and symptoms of intoxication and would have been visibly impaired. He stated that the visibly impaired condition of Mr. Boswell would have been obvious to a reasonably trained and reasonably perceptive police officer in Mr. Boswell's presence. Dr. Gary Lage opined that the overwhelming majority of people would be visibly intoxicated above .15%, and that even a person untrained in alcohol intoxication can recognize a person who is within the range of .2% to .4%. He opined that Mr. Boswell, at .244%, would be markedly impaired and would lack coordination. He stated that someone who encountered Mr. Boswell would observe signs of intoxication. Dr. Lage opined that he would expect that the visible effects of a .244 blood alcohol level would have been observable by a trained police officer. Dr. Robert Pandina, the expert for these defendants, stated that Mr. Boswell was intoxicated and that there would be motor, perceptual and judgment impairment. He stated that even a tolerant drinker would clearly show impairment in things requiring a high level of coordination. He stated that while a tolerant drinker may not appear to an observer to be impaired, a trained observer would be expected to look for signs and symptoms of intoxication.

It is also a disputed question of material fact as to whether Officer Feaster knew that Mr. Boswell was homeless. Officer Feaster claims that Mr. Boswell was not homeless because he had an identification card with an address on it. But Officer Feaster never asked Mr. Boswell where he lived, and the address on the identification card, 5 Elm Row, is an office building. Elm Row is two blocks from New Brunswick Police Headquarters and across the street from the county courthouse, and Officer Feaster, who had been a New Brunswick police officer for 26 years, had to know that no one lived at 5 Elm Row.

Because the court must take all of the plaintiffs' evidence as true on this motion for summary judgment, the court must accept that Mr. Boswell was intoxicated and that he exhibited visible signs and symptoms of intoxication that Officer Feaster observed. Applying the elements of the state-created danger theory, it is foreseeable that an intoxicated person attempting to cross a six-lane highway in the middle of the night will be harmed.

With respect to the second element, the Third Circuit noted in Miller v. City of Philadelphia, 174 F.3d 368, 374-5 (3d Cir. 1999), that the United States Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833 (1988), requires a showing of conduct that "shocks the conscience." However, the precise degree of wrongfulness required to reach the conscience-shocking level depends on the circumstances of a particular case. Estate of Smith v. Marasco, supra, 318 F.3d at 508. Thus, where the circumstances do not call for immediate decision-making and where forethought on the part of the state actor is possible, a showing of deliberate indifference satisfies the "shocks the conscience" standard. Estate of Smith v. Marasco, 430 F.3d 140, 153 (3d Cir. 2005). In Cassie v. Cape May, 610 F.Supp.2d 110, 119 (D.N.J. 2009), the court agreed that when a defendant has the luxury of proceeding in a deliberate fashion, deliberate indifference may be sufficient to shock the conscience.

Here, directing an intoxicated person to exit the park by crossing a six-lane highway at night was one of deliberate indifference and shocks the conscience. Immediate decision-making was not required here. Officer Feaster displayed much forethought in directing Mr. Boswell towards Route 18 and ordering him to leave the park unescorted. He had the luxury of proceeding in a deliberate fashion. There was a lot of time involved here. After being ordered from the park, Mr. Boswell first headed for the river, and Officer Feaster re-directed him towards Route 18. Mr.

Boswell then headed for the concession stand, and ripped up the ticket Officer Feaster had given him. Officer Feaster had time to pick up the quart bottle of beer, empty it and throw it into the trash before returning to his patrol car. Mr. Boswell was not running and now that Officer Feaster knew he had been drinking, he could have either called him back or gone to him to gather more information regarding the degree of his intoxication, instead of allowing him to continue toward the busy intersection. Officer Feaster was sitting in his patrol car and had time to write another ticket while Mr. Boswell walked towards the highway and attempted to cross it. All the time, Officer Feaster continued to observe Mr. Boswell on his way to Route 18. While sitting in his patrol car, Officer Feaster was advised of the accident and drove to the scene. He had sufficient time to think about what he was doing but he made a conscious decision not to help Mr. Boswell exit the park safely. This constitutes deliberate indifference that shocks the conscience.

With respect to the third element, the Third Circuit has held that where police officers, exercising their powers, exerted sufficient control over an individual, the relationship requirement has been met. Estate of Smith v. Marasco, supra, 318 F.3d at 509. Officer Feaster was exercising his power and authority as a police officer when he directed Mr. Boswell out of the park. In Ye v. United States, 484 F.3d 634, 638-639 (3d Cir. 2007), it was held that to satisfy the fourth element of the state-created danger doctrine a plaintiff must establish that (1) a state actor exercised his or her authority, (2) the state actor took an affirmative action, and (3) this act created a danger to the citizen or rendered the citizen more vulnerable to danger than if the state had not acted at all.

Officer Feaster exercised his authority and took affirmative action in ordering Mr. Boswell to leave the park by crossing Route 18. Defendants argue that plaintiffs cannot meet the third prong, and cite the unpublished opinion of Bilbili v. Klein, 249 Fed.Appx 284 (3d Cir. 2007), in which a car driven by a retired police officer was stopped for speeding. He was allowed to continue with a warning, and the officer stated that he observed no signs suggesting that the driver was intoxicated. An hour later, the driver was involved in a fatal accident and it was determined that he was legally intoxicated. With respect to the third prong, the court stated that the officer's failure to act did not create the danger because when the driver drove away from the last of the bars he had visited that evening, he had already consumed thirteen to fifteen beers, so that the danger faced by the Bilbili plaintiffs was created by the defendant driver's decision to get into his vehicle, not by the defendant officer's acts or omissions.

In the case at bar, however, the danger was not created by Mr. Boswell's decision to drink that night. Mr. Boswell was intoxicated, but he had put himself in a place of relative safety for the night. Had Officer Feaster not intervened, Mr. Boswell would probably have safely spent the night there. Mr. Boswell did not make the decision to leave the park. The danger was created when Officer Feaster ordered him out of the park and directed him toward the six-lane highway, leaving him to cross the highway at night alone and without assistance.

With respect to the final element, the Third Circuit has explained that the "dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and whether the act was more appropriately characterized as an affirmative act or omission. Morse v. Lower Merion School District, 132 F.3d 902, 915 (3d Cir. 1997). When Officer Feaster affirmatively ordered Mr. Boswell to leave the park and directed him to Route 18, he sent Mr. Boswell from a place of relative safety to the danger of attempting to cross a six-lane highway alone in an impaired condition.

The plaintiffs have met all the requirements to hold Officer Feaster liable for Mr. Boswell's injuries under the state-created danger theory. Therefore, he is not entitled to summary judgment on this issue.

B. OFFICER FEASTER IS NOT ENTITLED TO QUALIFIED IMMUNITY

Police officers, who act under the authority of the state, are liable under § 1983 when they violate someone's constitutional rights, unless they are protected by qualified immunity. The doctrine of qualified immunity provides that "government officials performing discretionary functions ... are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Because public officials exercising discretionary authority may sometimes abuse their discretion, the immunity is qualified and not absolute, so that civil damages can act as a restraint. Id. at 814. Qualified immunity is an affirmative defense and the burden of proving its applicability rests with the defendant. Beers-Capitol v. Whetzel, 256 F.3d 120, 142 n. 15 (3d Cir. 2001); 290 Madison Corp. v. Capone, 485 F.Supp. 1348 (D.N.J. 1980), cert. denied, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981).

There is a two-step test for determining whether the government official is entitled to qualified immunity. The threshold question is whether, taken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 104, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Here, the facts alleged by the plaintiffs show that there is sufficient evidence for a jury to conclude that Officer Feaster's conduct violated Mr. Boswell's constitutional right to personal security, bodily integrity and well-being and violated Mr.

Boswell's right to be free from state-created danger.

The next question is whether the contours of the constitutional right were sufficiently clear, in light of pre-existing law, that a reasonable person in the defendant's position would have understood that his conduct violated that right. Harlow v. Fitzgerald, supra, 457 U.S. at 818; Saucier v. Katz, supra, 533 U.S. at 202. This question may be answered by a review of the case law at the time of the defendant's actions. Id. Here, the constitutional right to be free from state-created danger was clearly established by the Third Circuit in 1996, long before the events giving rise to the plaintiffs' claims. As noted, the Third Circuit in Kneipp v. Tedder, 95 F.3d 1199 (1996), held that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983. Thus, at the time of Mr. Boswell's injury, a reasonable officer would have known that creating a danger to an individual by putting him in a situation where he is at great risk of harm would violate established constitutional rights.

It is not necessary that the prior case law be materially or fundamentally similar to the facts here, as officials can still be on notice that their conduct violates established law even in novel factual circumstances. Hope v. Pelzer, 536 U.S. 730, 746 (2002). There must be some but not precise factual correspondence between relevant precedents and the conduct at issue. In re City of Philadelphia Litigation, 49 F.3d 945, 970 (3d Cir.), cert. denied, Africa v. City of Philadelphia, 516 U.S. 863, 116 S.Ct. 176, 133 L.Ed.2d 116 (1995). Here, Kneipp established that a substantive due process violation arises when a police officer affirmatively places an individual in a position of danger that the individual would otherwise not have faced. Thus, a reasonable police officer would have appreciated that ordering an intoxicated individual from the park alone in the middle of the night by directing him to cross a six-lane highway unescorted would constitute disregarding a substantial risk of harm to that individual.

Accordingly, Officer Feaster is not entitled to qualified immunity on plaintiffs' § 1983 claim.

POINT IV

OFFICER FEASTER IS NOT ENTITLED TO IMMUNITY UNDER THE NEW JERSEY TORT CLAIMS ACT

Pursuant to N.J.S.A. 59:3-1, a public employee is liable for injury caused by his act or omission to the same extent as a private person, but the liability of the public employee is subject to any immunity of a public employee provided by law. Defendant Feaster claims that he is entitled to the good faith immunity of N.J.S.A. 59:3-3, which provides that a police officer is not liable if he acts in good faith in the execution or enforcement of any law.

To the extent that this case involves federal rights, the New Jersey Tort Claims Act does not provide immunity for violations of federal law. Tice v. Cramer, 133 N.J. 347, 375 (1993); Anela v. City of Wildwood, 595 F.Supp. 511 (D.N.J. 1984). Federal rights cannot be denied by the passage of state legislation. T & M Homes, Inc. v. Township of Mansfield, 162 N.J.Super. 497, 506 (Law Div. 1978).

The standard for determining summary judgment motions is that the trial court must accept as true all the evidence which supports the position of the party defending against the motion, must accord him or her the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995); Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). Therefore, it must be accepted that Mr. Boswell was intoxicated at the time of his encounter with Officer Feaster, that he was exhibiting the signs and symptoms of his intoxication, and that Officer Feaster observed these signs and knew that Mr. Boswell was intoxicated.

Del Tufo v. Township of Old Bridge, 278 N.J.Super. 312, 326 (App.Div. 1995), aff'd. on other grounds, 147 N.J. 90 (1996), the Appellate Division held that the immunity of N.J.S.A. 59:3-3 was not applicable because the issue was not the enforcement of any law but the duty to provide medical assistance to an arrestee while enforcing the law. In that case, the police officers did not summon emergency medical assistance for a person they were arresting despite the fact that he showed signs of injury and was behaving bizarrely. The Appellate Division stated that the plaintiff was not complaining that the defendant should not have executed or enforced the law, and held that their duty to execute or enforce the law did not preclude them from providing emergency medical assistance to their arrestee. The Appellate Division held that the immunity for enforcing and executing the law did not protect these defendants.

Here, defendant Feaster is not entitled to immunity because the issue involved is not the enforcement or execution of a law but the duty to provide medical assistance to Mr. Boswell while enforcing the law. Officer Feaster was ostensibly enforcing the city ordinance against being in the park after hours. But Mr.

Boswell was intoxicated and was exhibiting signs and symptoms of intoxication. Therefore, Officer Feaster had a duty to provide medical assistance and to protect Mr. Boswell as part of the enforcement of the law.

Assuming *arguendo* that the immunity of N.J.S.A. 59:3-3 is applicable here, the question of good faith is generally a fact question for a jury. Stoeckel v. Township of Knowlton, 387 N.J.Super. 1, 19 (App.Div.), certif. denied, 188 N.J. 489 (2006). The issue of good faith is not one that lends itself to disposition on summary judgment. Evans v. Elizabeth Police Department, 236 N.J.Super. 115 (App.Div. 1983). Summary judgment is appropriate only where there is no factual dispute about the defendant's actions and it is clear that those actions were objectively reasonable or performed with subjective good faith. Canico v. Hurtado, 144 N.J. 361, 365 (1996). Further, reckless action in the enforcement of the law may negate good faith. Dunlea v. Township of Belleville, 349 N.J.Super. 506, 512 (App.Div.), certif. denied, 174 N.J. 189 (2002). Here there is a factual dispute regarding the defendant's actions because the plaintiff's evidence shows that Mr. Boswell had a .244% blood alcohol level and that he would have been exhibiting signs and symptoms of intoxication, whereas Officer Feaster claims that he saw nothing to indicate that Mr. Boswell was intoxicated or incapacitated. Therefore, summary judgment is inappropriate.

To support his claim of immunity under N.J.S.A. 59:3-3, defendant contends that he was enforcing the city ordinance against being in the park after hours when he ordered Mr. Boswell out of the park and directed him towards Route 18. Defendant cites Morey v. Palmer, 232 N.J.Super. 144 (App.Div. 1989), in support of his contention that he is immune from liability. In Morey, a police officer had received a report of an individual in the middle of a highway. The officer saw that the individual was intoxicated and ordered him to leave the area. Four hours later and a quarter of a mile away, the individual was struck and killed. The Appellate Division found that the officer was immunized under N.J.S.A. 59:3-3 because his discretionary election to limit his response to ordering and escorting the decedent off the roadway is a sufficient "act" in the enforcement of law to secure the immunity.

The facts in Morey are the exact opposite of the facts in this case. In Morey, the individual was on the highway and was already in danger when the officer arrived. Here, Mr. Boswell was in a place of safety when Officer Feaster came upon him. In Morey, the officer escorted the individual off the highway. Here, Officer Feaster did not escort Mr. Boswell to safety; instead, he directed him **to** the highway with its attendant dangers. In Morey, the fatal accident occurred four hours after the officer had escorted the individual off the highway. Here, the accident occurred within minutes of Officer Feaster's directing Mr. Boswell toward the dangerous highway.

As noted previously, former police chief Kraus, the expert for these defendants, opined that Officer Feaster had a duty to gather all information and to recognize the signs and symptoms of intoxication. Officer Feaster failed in that duty.

The action of Officer Feaster in directing Mr. Boswell into danger was not objectively reasonable. He knew that Mr. Boswell was intoxicated, and he knew that it was dangerous even for a non-intoxicated person to cross the six lanes of Route 18 at night. Yet he directed Mr. Boswell toward Route 18 and gave him no assistance in crossing the highway. In addition, Officer Feaster's actions were not objectively reasonable because he knew that Mr. Boswell was homeless. As a 26-year veteran of the New Brunswick Police Department, Officer Feaster knew that no one lived at 5 Elm Row.

Defendant also alleges that he is entitled to immunity under N.J.S.A. 59:3-2(b), which provides that "[a] public employee is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature." Although it would appear from the plain language of this statute that it would not apply to police officers, there are two Appellate Division cases holding that this subsection is applicable to immunize a police officer's decision not to take someone into custody. Perona v. Township of Mullica, 270 N.J.Super. 19, 28-29 (App.Div. 1994); Blunt v. Klapproth, 309 N.J.Super. 493, 510 (App.Div.), certif. denied, 156 N.J. 387 (1998). But, as noted by the comments to this section in Margolis and Novak, Claims Against Public Entities, p. 81 (2010 ed.): "It is difficult to understand how the police conduct in these factual settings could constitute discretionary decisions of a 'legislative or judicial nature', as required by the language of this provision."

Officer Feaster is not entitled to summary judgment as he was negligent in the performance of his duties. Under N.J.S.A. 59:5-4, a police officer is not liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service. In Suarez v. Dosky, 171 N.J.Super. 1 (App.Div. 1979), certif. denied, 82 N.J. 300 (1980), liability was imposed on two state police officers for the negligent performance of their duties. A vehicle occupied by eight persons went out of control and came to rest on the shoulder and grass berm adjacent to the eastbound side of Route 80 at about 10:30 p.m. No one was injured, but the car was disabled. Shortly after, two state police officers arrived and issued a summons to the driver for operating an unsafe vehicle. They radioed for a tow truck, which removed the automobile from the highway. Despite a request, the troopers declined to escort the now stranded occupants from Route 80 and refused to radio for a taxi. They advised the group, which included two young children, two and three years of age, to walk to the nearest exit and off the highway. During their walk, one of the two young children wandered onto the lane of travel and was immediately struck and killed. In an attempt to rescue the child, plaintiff's decedent was also struck and killed. Suit was filed against the State and the two officers. The jury returned a verdict in plaintiff's favor, and the state and officers appealed, contending that N.J.S.A. 59:5-4 afforded them complete immunity from tort liability. Finding that the statute only precludes suits based on allegations that the damage resulted from the absence of a police force or from the presence of an inadequate police force, the Appellate Division held that the statute had no application to this case. The Appellate Division held that although a police officer may not be liable for failing to respond, if he does respond, he will be subject to liability for negligence in the performance of his ministerial duties. Id. at 9-10. The Appellate Division noted that the officers could have and should have foreseen danger to the group stranded at night on the interstate.

Here, Officer Feaster was performing a ministerial duty in patrolling the park and in issuing a summons to Mr. Boswell for being in the after hours. He was performing a ministerial duty by ordering Mr. Boswell to leave the park. But he could have and should have foreseen the danger to Mr. Boswell, who was intoxicated, in attempting to cross the six lanes of Route 18 unescorted and unassisted. Therefore, he can be held liable for negligence in the performance of his duties.

Finally, defendant Feaster is not entitled to summary judgment because N.J.S.A. 59:3-14 provides that a public employee is not exonerated from liability for conduct that constitutes willful misconduct. Willful misconduct "is not immutably defined but takes its meaning from the context and purpose of its use." Fielder v. Stonack, 141 N.J. 101, 124 (1995). For purposes of the Tort Claims Act, willful misconduct has been defined as the "commission of a forbidden act with actual knowledge that the act is forbidden". Kollar v. Lozier, 286 N.J.Super. 462, 470 (App.Div.), certif. denied, 145 N.J. 373 (1996). It is conduct that is much more egregious than ordinary negligence. Fielder, supra. 141 N.J. at 123-127. Bernstein v. State, 411 N.J.Super. 316, 332 (App.Div. 2010).

Officer Feaster's conduct was much more egregious than ordinary negligence. He knew that Mr. Boswell was intoxicated. He knew that Route 18 is a dangerous highway for pedestrians to cross. He knew that he should have obtained medical assistance for Mr. Boswell and should have either taken him to the hospital or to police headquarters. He knew that directing an intoxicated person to cross a dangerous highway unassisted is a forbidden act. His act of affirmatively directing Mr. Boswell to Route 18 constituted willful misconduct.

POINT V

SUMMARY JUDGMENT IS NOT APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE

Pursuant to F.R.Civ.Pr. 56, a motion for summary judgment shall be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment is to be granted only if, upon review of the materials properly before the court, and viewing the evidence in the light most favorable to the nonmoving party, the court is convinced that no genuine issue of material fact remains for trial and that the movant is entitled to judgment as a matter of law. Michaels v. New Jersey, 222 F.3d. 118 (3d Cir. 2000); Krieger v. Ownership Corp., 270 F.2d 265 (3d Cir. 1959); Lang v. New York Life Insurance Co., 721 F.2d 118 (3d Cir. 1983). The standard for summary judgment is a stringent one. Itzkoff v. F & G Realty of New Jersey, 890 F.Supp. 351 (D.N.J. 1995).

On a motion for summary judgment, the court should view the facts in a light most favorable to the nonmoving party and draw all inferences in that party's favor. Marzano v. Computer Science Corp., Inc., 91 F.3d 497 (3d Cir. 1996). Conflicting factual contentions may not be resolved by the district court on a motion for summary judgment. Paton v. La Prade, 524 F.2d. 862 (3d Cir. 1975). Cases that turn on credibility determinations should not be resolved on summary judgment. Cinelli v. U.S. Energy Partners, 77 F.Supp. 566 (D.N.J. 1999). The standard for determining summary judgment motions is that the trial court must accept as true all the evidence which supports the position of the party defending against the motion, must accord him or her the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976).

Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and there is no genuine issue of material fact. Hampton v. Borough of Tinton Falls Police Dept., 98 F.3d 107 (3d Cir. 1996). For purposes of deciding whether to grant summary judgment, a fact is "material" if it will affect the outcome of the lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998); Baxter v. AT&T Communications, 712 F.Supp. 1166 (D.N.J. 1989). If there is any evidence in the record from any source from which a reasonable inference in favor of the party opposing the motion for summary judgment may be drawn, the moving party simply cannot obtain summary judgment. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996). Where the nonmoving party provides sufficient evidence to allow a reasonable jury to find for him at trial, a genuine issue of material fact has been created that precludes summary judgment. Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3d Cir. 1998). The standard is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-251 (1986).

The facts and circumstances of this case establish that genuine issues of material fact exist and that the defendants are not entitled to summary judgment as a matter of law. Accordingly, their motion for summary judgment should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for summary judgment filed by defendants City of New Brunswick, New Brunswick Police Department and James Feaster be denied.

RESPECTFULLY SUBMITTED,

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Dated: March 17, 2010